



Kentucky Law Journal

Volume 35 | Issue 3

Article 10

1947

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Recommended Citation

Mann, Arnett (1947) "The Negligent Murder--Is it Objective or Subjective? (Subjective View)," *Kentucky Law Journal*: Vol. 35 : Iss. 3 , Article 10.

Available at: <https://uknowledge.uky.edu/klj/vol35/iss3/10>

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THE NEGLIGENT MURDER—IS IT OBJECTIVE OR SUBJECTIVE? (Subjective View)*

Justice Holmes took the position that a dangerous act causing the death of a human being constituted murder if the actor had knowledge of circumstances that would have led "a man of common understanding" to foresee death or serious bodily harm from the act.¹ Thus, the test of the negligent murder, according to Holmes, is objective: Would a reasonable man, knowing these circumstances, have foreseen danger to human life? If so, the actor is guilty of murder whether he was actually aware of the danger or not.

Stephen took a different view, maintaining that in order for death from a dangerous act to constitute murder, the actor must have had knowledge of the danger accompanying that act.² This is a subjective requirement and probably represents the weight of authority in the United States.³

At first blush these two views seem to be very similar. Where the actor had knowledge of the circumstances he will usually have had knowledge of the danger—at least a jury may safely infer so in most cases. However, it is theoretically possible to have knowledge of the circumstances and yet not have knowledge of the danger.⁴ For example, a person who is very drunk, or whose mind is befogged with fatigue and drowsiness, might be aware that he is driving his car, that the streets are crowded, and yet not be able to draw the conclusion that these facts, plus a fast rate of speed, constitute great danger.

If this is true, a practical difference is seen between the view of Stephen and that of Holmes, at least in some cases. Suppose, in the hypothetical situation above, that a pedestrian were killed. The driver could not be guilty of murder under Stephen's view since he did not have knowledge of the danger. Having had knowledge of

* A Companion Note taking the objective view is printed pp. 242-251.

¹ HOLMES, *THE COMMON LAW* (1881) 55-56.

² "Malice aforethought means any one or more of the following states of mind . . . (b) knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not; although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused." STEPHEN, *DIGEST OF THE CRIMINAL LAW* (1887) 161-162.

³ MORELAND, *A RATIONALE OF CRIMINAL NEGLIGENCE* (1944) 59; see *State v. Massey*, 20 Ala. App. 56, 100 So. 625, 627 (1924); *State v. Capps*, 134 N. C. 622, 46 S. E. 730, 732 (1904); *Tarver v. State*, 90 Tenn. 485, 16 S.W. 1041, 1044 (1891); *Aiken v. State*, 10 Tex. App. 610, 618 (1881).

⁴ MORELAND, *op. cit. supra*, n. 3; n. 191 at 55.

the circumstances, however, he might be guilty under the objective view of Holmes.

The purpose of this note is to determine which of these tests is the more desirable as a basis for determining whether, in cases of death resulting from extremely dangerous conduct, murder has been committed. This problem is important, for the law would, by adopting the view of Holmes, make the pattern of negligence uniform by determining liability, both civil and criminal, objectively. Civil liability is now arrived at in this manner,⁵ and according to several writers the trend in the criminal law is in the direction of such objectivity.⁶

Whether the view of Holmes or that of Stephen is the more satisfactory will depend on the answer given to the question: Is *mens rea* a requisite of negligent murder? This requires a brief consideration of the doctrine of *mens rea*.

An historical basis of that doctrine is the Christian concept of freedom of the will.⁷ If an individual, having freedom of will, committed a harmful act accompanied by a mental element such as intent, he was deemed deserving of punishment, for a guilty mind was indicated. So, clearly a mental element was required to prove a wrongful exercise of the will and therefore a guilty mind. While the historical purpose (punishment) of establishing *mens rea* may no longer have efficacy, and though *mens rea* may differ today from its historical meaning,⁸ the concept of freedom of the will still remains. Indeed, our democratic institutions, dependent on responsibility of the individual, necessarily presuppose that the individual has freedom of the will. Therefore, this writer believes that this concept underlies the fixing of criminal responsibility. To deny this is to say that the individual may be criminally responsible for an act which is the product of factors over which he had no control and, therefore, could not have prevented. Thus wrongful exercise of the will is a prerequisite of criminality.

This prerequisite obviously cannot occur in negligent murder unless the individual is confronted with a choice to act dangerously or to act safely.⁹ If then he commits an extremely dangerous act and death (though not intended) results from it, the actor is guilty of negligent murder, for by an exercise of his will he chose to do the act which caused the death.

⁵ RESTATEMENT, TORTS (1934) Sec. 282.

⁶ CLARK AND MARSHALL, *LAW OF CRIMES* (4th ed. 1940) Sec. 42; Levitt, *Extent and Function of the Doctrine of Mens Rea* (1923) 17 ILL. L. REV. 578; Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 1019; Sayre, *Public Welfare Offenses* (1933) 33 CALIF. L. REV. 55, 58.

⁷ Levitt, *op. cit. supra*, n. 6.

⁸ Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 1019.

⁹ This approach would lead to the conclusion that in negligent manslaughter *mens rea* is also required. See SALMOND, *JURISPRUDENCE* (7th ed. 1924) Sec. 140; Book Review (1945) 9 CUMB. L. J. 147; Note (1898) 12 HARV. L. REV. 428, 429.

The key word is *choice*, for without having had it, it could not be proved that the actor wrongfully exercised his will. But choice is based on a mental state—knowledge of alternatives. The alternatives are to act dangerously or not to act dangerously. Obviously, knowledge of the danger is necessary to confront one with a choice between these alternatives. Otherwise, it could not be said that he chose to act dangerously. As a test in itself the theory of Holmes does not satisfy the mental element requisite for choice (knowledge of the alternatives). However, knowledge of the circumstances may be used to prove, by inference, that the actor had knowledge of the danger and therefore knowledge of the alternatives—to act dangerously or not to act dangerously. This would be an application of a subjective test in proving knowledge of the danger by inference. This is probably precluded in cases such as extreme drunkenness and absent-mindedness.

From the foregoing it would seem that in negligent murder knowledge of extreme danger accompanying an act resulting in death is necessary to prove a requisite *mens rea*. This *mens rea* may be termed wanton indifference to the safety of others.

The law as applied in the cases bears out the logic of the conclusion just reached. The law has evidently recognized that there is a state of mind close to, and just as reprehensible as, intent to take life—wanton indifference as to whether the death of another occurs or not. That is, disregard of a known danger (extreme) which results in death, is deserving of the label, "murder." As one court said in convicting of murder: "That man who can coolly shoot into a moving train, or automobile, or other vehicle in which are persons guiltless of any wrongdoing toward him or provocation for such attack, is, if possible, worse than the man who endures insult and broods over a wrong, real or fanciful, and then waylays and kills his personal enemy."¹⁰ Thus, when malice is presumed¹¹ or intent implied,¹² the court is convicting for murder one whose state of mind proved just as dangerous to human life as that of the intentional killer. That this state of mind is wantonness is further evidenced by the language used by the courts in describing the negligent murderer. Typical descriptions state that the defendant had a "depraved mind,"¹³ "malignity of heart,"¹⁴ a heart "regardless of social duty and fatally bent on mischief."¹⁵ These are subjective terms, descriptive of a state of mind (wanton indifference) which led the actor to ignore extreme danger known to accompany his act.

¹⁰ Banks v. State, 85 Tex. Crim. Rep. 165, 211 S.W. 217, 218 (1919).

¹¹ Smith v. State, 124 Ga. 213, 52 S. E. 329, 330 (1905).

¹² Russell v. State, 38 Tex. Crim. Rep. 590, 44 S. W. 159, 160-61 (1898); see Pool v. State, 87 Ga. 526, 13 S. E. 556, 557 (1891).

¹³ State v. Massey, 20 Ala. App. 56, 100 So. 625, 627 (1924); Bailey v. State, 133 Ala. 155, 32 So. 57, 58 (1902).

¹⁴ Tarver v. State, 90 Tenn. 485, 16 S.W. 1041, 1044 (1891).

¹⁵ State v. Young, 50 W. Va. 96, 40 S. E. 334 (1901).

The discussion to this point has warranted the conclusion that the negligent murder requires a form of *mens rea*, wanton indifference, which can be proved by the theory of Stephen but not by that of Holmes. It might be well to test this conclusion by determining whether it is in accord with the purpose of the criminal law.

Whether that purpose be either punishment or prevention and deterrence, the end to be obtained is that of making men choose to conform.¹⁶ The theory of Stephen is helpful in this respect. It provides an index to the mind and character of the accused. If it is determined that he had knowledge of the danger and yet ignored it, the causes of his failure to choose to conform are indicated. These may be deep seated mental attitudes: indifference to the rights of others, anti-social outlook, desire for dangerous experiences, and so on.

But, to ignore a criminal's state of mind at the time of the act, except that he had knowledge of the circumstances, and to proceed objectively, is to refuse to face these subjective factors that made the individual a criminal.

It follows that whatever the purpose of the criminal law, in dealing with the criminal, the theory of Stephen is more helpful than that of Holmes. For, if the purpose is to punish, the index to his character and mind reveals the extent of the punishment necessary. Indeed, knowledge of the danger must be proved to establish blameworthiness (calling for punishment). Without such knowledge the individual may have exercised his best judgment and thought his conduct safe. The objective theory would not prove that an individual had knowledge of the danger but that as a reasonable man he is deemed to have had. This is based on the obvious fallacy that men are all alike. At least in such situations as absent-mindedness, knowledge of the danger, and therefore blameworthiness at the time of the act, are precluded. Thus, punishment under an objective test would prove unwise. As one prominent writer states: "To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure."¹⁷

If the purpose of the criminal law is to prevent and deter dangerous acts, from this index, as a guide, may be fashioned measures with the view of preventing and deterring the dangerous states of mind responsible for such acts. The preventive theory is based on the probability that similar injuries will be instigated in the future by the same offender.¹⁸ But this probability cannot be determined without looking to the mind of the actor at the time he did the act. If he had knowledge of the danger, he might be likely to repeat the offense, but if he did not, the offense may have been one not likely

¹⁶ Sayre, *op. cit. supra*, n. 8, n. 4 at 975-76.

¹⁷ Sayre, *Public Welfare Offenses* (1933) 33 COL. L. REV. 55, 72.

¹⁸ SAYRE, *CASES ON CRIMINAL LAW* (1927) 12.

to occur again. A murder conviction would therefore not only be unjust; it would serve no useful purpose.

In another respect the objective test fails to aid in preventing dangerous acts. It is little concerned with mental states but emphasizes the external manifestations of them. This being true, an individual may not strive to obtain the desired level of mental and moral excellence which prevents dangerous conduct; but may actually be discouraged therefrom.¹⁹ The reason is obvious. An individual may strive to be a good citizen, and as nearly perfect mentally and morally as possible. Yet, under an objective test he might be found guilty of negligent murder for engaging in conduct the danger of which he was not aware. How this would make an individual choose to conform to a desired standard of conduct is difficult to understand. For these reasons, the theory of Stephen, requiring knowledge of the danger to convict of negligent murder, is more in accord with the possible purposes of the criminal law than is the objective theory of Holmes.

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¹⁹ Note (1939) 27 Ky. L. J. 229, 231.